

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

JOHN SOLAK and DENNIS	)	
O'ROURKE, individually and on	)	
behalf of all others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:14-cv-2856-WSD
	)	
THE HOME DEPOT, INC.,	)	
	)	
Defendant.	)	

**MOTION TO DISMISS THE COMPLAINT**

NOW COMES Defendant The Home Depot , Inc. ("Defendant"), by counsel, and respectfully moves the Court, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), to dismiss the Complaint in this action.

This case is one of several putative consumer class actions that have been filed in the last month in connection with a criminal intrusion into Home Depot's data systems. Plaintiffs John Solak and Dennis O'Rourke ("Plaintiffs") allege that the criminal intrusion caused them to become the targets of "imminent" and "impending" "increased threat of identity theft and fraud." Compl., Doc. 1, ¶¶ 21, 23. They seek to represent 50 statewide classes on claims of negligence, unjust

enrichment, bailment, and breach of implied contract. They also seek to represent 37 statewide classes under specific state data-breach statutes.

As explained in more detail in the incorporated and attached memorandum of law, Plaintiffs' claims fail as a matter of law for three reasons:

- (1) Plaintiffs lack Article III standing to bring these claims because they have not alleged nor suffered any injury-in-fact. Speculative claims of hypothetical future identity theft or fraud are not sufficient to confer standing. Mr. O'Rourke's alleged injury—a \$49.99 fraudulent charge—is likewise insufficient to establish injury-in-fact because he does not allege that he actually incurred that loss (*i.e.*, that he was not reimbursed for it) and he does not plausibly allege that the purportedly fraudulent charge can be fairly traced to the Home Depot data breach.
- (2) Plaintiffs also lack standing to represent purported statewide classes of plaintiffs from states where neither Plaintiff made a Home Depot purchase nor where either Plaintiff resides. The unnamed class members' claims do not confer standing on these Plaintiffs.
- (3) Plaintiffs' claims also fail as a matter of law. They have no private right of action to bring their data-breach claim, and the statute does not apply to Home Depot. And they cannot plausibly plead the required elements for their negligence, breach of implied contract, bailment, and unjust enrichment claims.

Accordingly, Home Depot respectfully requests that this Court dismiss the Complaint with prejudice.

Respectfully submitted, this 13th day of October, 2014.

/s/ Phyllis Sumner

Phyllis B. Sumner

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**CERTIFICATE OF COMPLIANCE**

Pursuant to L.R. 7.1D, the undersigned certifies that the foregoing complies with the font and point selections permitted by L.R. 5.1B. This Motion was prepared on a computer using the Times New Roman font (14 point).

Respectfully submitted, this 13th day of October, 2014.

/s/ Phyllis Sumner

Phyllis B. Sumner

Georgia Bar No. 692165

**CERTIFICATE OF SERVICE**

The undersigned counsel for Defendant Home Depot U.S.A., Inc. hereby certifies that a true and correct copy of the foregoing was filed on October 13, 2014 with the Court and served electronically through the CM-ECF (electronic case filing) system to all counsel of record registered to receive a Notice of Electronic Filing for this case. I further certify that a true and correct copy of the foregoing was served by U.S. Mail, postage prepaid, this 13th day of October, 2014, on the following:

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/s/ Phyllis Sumner  
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